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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:

Office: CALIFORNIA SERVICE CENTER

Date:

FEB 21 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:


This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was approved by the Director, California Service Center. Upon subsequent review, the director properly issued a Notice of Intent to Revoke, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California organization incorporated in October of 1998. It is engaged in the import, wholesale, and retail of electronic appliances and musical instruments. It seeks to employ the beneficiary as its president. Accordingly, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager.

The director initially approved the petition. Upon review of the record, the director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's overseas employer. After properly issuing the Notice of Intent to Revoke, the director revoked the petition on March 7, 2002.

On appeal, counsel for the petitioner asserts that the beneficiary is exclusively engaged in performing executive duties and that objective evidence in support of this claim has been submitted. Counsel also asserts that a parent/subsidiary relationship has been established between the petitioner and the beneficiary's overseas employer.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States enterprise.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially stated that the beneficiary's duties in the position of president included the following:

[P]lan, develop and establish policies and objectives for the company; direct and coordinate formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments; review operation and financial reports and based on current condition [sic] to make necessary changes in operation; evaluate performance of department managers to determine promotion and bonus; supervise, hire and fire employees. [The beneficiary] has immediate supervisory power over the general manager and she also has secondary supervisory authority over office staff and sales representatives.

Subsequent to the director's approval of the petition, the director requested evidence of the petitioner's employees in the form of the petitioner's California Form DE-6, Quarterly Wage Reports.

The petitioner provided the California Form DE-6 for the quarter ending March 31, 2000. This California Form DE-6 shows the number of the petitioner's salaried staff at the time the petition was filed. The California Form DE-6 reveals five employees. The beneficiary is included on the California Form DE-6 as well as the individual identified as the petitioner's operation manager. The California DE-6 includes three other employees but only one of the individuals can be identified on the organizational chart. The organizational chart shows this individual holding the position of sales representative. The petitioner also provided its Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements issued for the year 2000. The two individuals unidentified by position on the organizational chart were paid the sums of \$4,000 and \$4,400 for the entire year.

The record indicates that subsequent to the filing of the petition the petitioner hired a sales manager and a customer service representative. However, the employment of these individuals cannot be considered, as the petitioner must establish eligibility

at the time of filing the petition; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In addition to the California Form DE-6, the petitioner expanded upon the previous description for the beneficiary's position. The petitioner indicated that the beneficiary met with her managers to discuss problems, reviewed financial and sales reports and international trade publications, authorized expenditures and negotiated business contracts and freight tariffs as necessary, and also authorized changes in staff, and continuously formulated and adjusted the financial program. At the time this position description was provided, November 5, 2000, the petitioner was claiming a total of ten employees.¹

Upon review of the information in the record the director properly issued a notice of intent to revoke approval of the petition.

The director stated in his Notice of Intent to Revoke that the petitioner's business did not have a reasonable need for an executive because it was a small five-employee import and export business. The director also stated that as the petitioner had only four other employees the beneficiary would necessarily be involved in the performance of non-executive duties. The director further stated that the beneficiary did not qualify as a "manager" for immigration purposes because she was essentially a first-line supervisor over non-professional and non-managerial employees. The director finally stated that the beneficiary did not qualify as a functional manager.

In rebuttal to the Notice of Intent to Revoke, counsel for the petitioner asserts that the beneficiary is an executive and that this claim is supported by the petitioner's description of the beneficiary's job duties as well as the petitioner's by-laws giving the president general supervision, direction and control of the business. Counsel also takes issue with the director's speculation regarding the petitioner's need for an executive. Counsel confirms that the petitioner is seeking the beneficiary's services as an executive and not as a manager.

The director determined that the description of the beneficiary's duties was not corroborated by independent, objective evidence and that stating the beneficiary will perform the duties that appear in the statutory criteria for "executive capacity" was not sufficient. The director concluded that the petitioner had not established that it possessed the organizational complexity to

¹ Although the petitioner claims ten employees as of November 2000, the petitioner offered independent evidence of only eight employees for the year 2000. The IRS W-2 Forms for the year 2000 evidence eight employees, three of which were paid \$4,400 or below for the year.

warrant having an executive as defined by the Act.

On appeal, counsel for the petitioner submits documents signed by the beneficiary to secure a revolving line of credit, requests signed by the beneficiary to the IRS for tax records, correspondence between the beneficiary and a certified public accountant, and correspondence with overseas customers requesting information. Counsel asserts these documents "show that the beneficiary has actually been serving as the President and engaged in directing the management, and establishing the goals and policies of the company, directing financial programs to provide funding for operations, monitoring the financial condition of the company; etc., with wide latitude in discretionary decision-making." Counsel also submits documentation to evidence the performance of other necessary duties by the beneficiary's subordinates to demonstrate that the beneficiary is not involved in the performance of "menial" duties at the company.

Counsel's assertions are not persuasive. The petitioner initially described the beneficiary's position in broad terms borrowing liberally from the definition of "executive capacity." See section 101(a)(44)(B)(ii) of the Act. The position description also vaguely refers to duties, such as, "coordinat[ing the] formulation of financial programs to provide funding for new or continuing operations to maximize returns on investments," and "review[ing] operation and financial reports and based on current condition [sic] to make necessary changes in operation." It is not possible to determine from these statements whether the beneficiary is performing executive duties with respect to these activities or whether the beneficiary is actually performing the activities. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In an effort to understand the daily duties of the beneficiary, the Service looks to the remaining information in the record. At the time of filing the petition, the petitioner employed an operations manager, a sales representative, and two part-time employees in addition to the beneficiary. The petitioner did not provide job descriptions for these employees at the time of filing the petition. The description of these job positions subsequent to the filing of the petition does not provide sufficient information to indicate that any of these individuals prepared or formulated operation and financial reports for the beneficiary's review. The beneficiary at the time of filing the petition appears to be the person responsible for obtaining financing and providing the basic market research necessary for the continued operation of the petitioner. The documentation provided by counsel on appeal does not necessarily demonstrate that the beneficiary is operating in an executive capacity but simply indicates that the beneficiary is acting on behalf of the

company to obtain credit or obtain information from the IRS or overseas customers. The record does not support a conclusion that a majority of the beneficiary's duties relate to operational or policy management rather than performing basic operational tasks for the petitioner. The record does not demonstrate that the beneficiary plans, organizes, directs, and controls the petitioner's major functions of import, retail, and wholesale of products through the work of other employees.

The petitioner's remaining description of the beneficiary's duties provided with the petition dealt with the managerial aspect of the beneficiary's position. The petitioner indicated that the beneficiary was responsible for "evaluat[ing] the performance of department managers to determine promotion and bonus; supervis[ing], hir[ing] and fir[ing] employees," as well as having "immediate supervisory power over the general manager," and "secondary supervisory authority over office staff and sales representatives." In addition to re-stating elements of the managerial definition, this information does not correspond to the staff on hand when the petition was filed. The petitioner employed an individual with the title "operations manager," one sales representative, and two part-time employees at the time the petition was filed. The petitioner did not provide independent documentation of other employees or independent contractors who performed the tasks of the company thereby leaving the beneficiary to focus primarily on executive or managerial duties.

The petitioner's response to the director's request for evidence does not explain how reviewing reports and publications, authorizing expenditures, and negotiating business and freight tariff contracts are primarily executive duties. When reviewing these duties in context of the staff on hand at the time the petition was filed, it becomes more evident that the beneficiary was performing the tasks necessary to operate the company.

Although we agree that the director should not speculate regarding the petitioner's need for an executive based solely on the size and business of the petitioner, we cannot agree that the record taken as a whole demonstrates that the beneficiary is primarily engaged in an executive capacity. The record contains insufficient evidence to demonstrate that at the time the petition was filed the beneficiary had been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position would be primarily managerial or executive in nature. In addition, a portion of the position description serves to merely paraphrase the statutory definitions of managerial and executive capacity. The Service is unable to determine from the record the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary managed a

subordinate staff of professional, managerial, or supervisory personnel who will relieve her from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been or will be employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the claimed affiliated company.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner has provided sufficient information that it is a wholly-owned subsidiary of the beneficiary's overseas employer and that a qualifying relationship exists. The director's decision will be withdrawn as it relates to the question of qualifying relationship.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.